Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 83-997
Respondent in No. 83-1325

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE & WOLFF
Of Counsel

HENRY J. OECHLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for Trans World Airlines, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 83-997
Respondent in No. 83-1325

INTRODUCTION

The briefs by the other parties highlight the difficult situation which confronted TWA when it sought to comply with the ADEA amendments. On the one hand, the *Thurston* plaintiffs and the EEOC contend that TWA and ALPA are jointly liable for a policy which went further in accommodating downbidding Captains than any other trunk airline.[1] On the other hand, ALPA says that neither it nor TWA should be liable but that if liability is jointly imposed, then TWA alone should be stuck with total monetary liability. In the final analysis, Judge Van Graafeiland's observation below that TWA is really worthy "of receiving commendation for what it has done" (A-36) is fully supported by the record.

I. THE PLAINTIFFS HAVE FAILED TO PROVE THAT TWA'S AGE 60 POLICY WAS UNLAWFUL

A. The Undisputed Facts Show How TWA Has Satisfied the ADEA

Stripped of the plaintiffs' rhetoric, this is not a complex case. This Court need only focus on certain undisputed facts in its examination of TWA's "age 60" policy:

1. There is an FAA rule which prohibits Captains and First Officers from serving in those positions beyond age 60, and that rule is subject to the BFOQ provision of the ADEA (A-7 to A-8);

---

1 As noted in TWA's opening brief (p. 8 n.8), there is a threshold question whether the EEOC has the authority to enforce the ADEA in view of *INS* v. *Chadha*, ____ U.S. ____, 103 S. Ct. 2764 (1983). The issue is now of heightened importance because the Second Circuit, from which this case is appealed, has recently ruled that *Chadha* bars the EEOC from enforcing the ADEA. *EEOC* v. *CBS, Inc.*, ____ F.2d ____, 35 FEP Cases 1127 (2d Cir. 1984). While this does not moot the claims of the private plaintiffs (and therefore does not moot the issues in this case), there is the obvious question of the EEOC's status to represent anyone here. TWA reserves all rights in this regard in the event of remand.

2. The bidding procedures of the TWA Working Agreement are the heart of the contractual seniority system and serve as the basic mechanism in deploying the pilot work force (J.A. 185, ¶ 3);

3. In order for a bid to be awarded, there must be a vacancy (TWA Op. Br., pp. 9-10);

4. The plaintiffs "could not establish that there were flight engineer vacancies at the time they applied to transfer" (A-23);

5. Unable or unwilling to change status, the plaintiffs reached age 60 as Captains, a position in which they no longer could lawfully perform (A-10);

6. "Most of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60" (A-10). In fact, it is "unrebutted" that 83% succeeded in that regard (A-61 n.8);[2]

7. In a few situations unrelated to age, a vacancy (and the award of a bid) is not required in order to change status (TWA Op. Br., pp. 12-13);

---

2 As the EEOC concedes in its brief (p.17), only a "handful" of Captains were not awarded a Flight Engineer vacancy. The *Thurston* plaintiffs also do not challenge the accuracy of TWA's 83% overall success rate, but they do now try to distort TWA's data by making their own analysis limited to the transitional year of 1978 (*Th.* Br., p. 3). However, that is contrary to this Court's decision in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), to examine statistical data in employment discrimination cases on the basis of "cumulative results." *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282, 308 (N.D. Cal. 1980), *aff'd*, 694 F.2d 531 (9th Cir. 1982). See generally Schlei and Grossman, *Employment Discrimination Law* 1364-65 (2d ed. 1983).

8. TWA was the only trunk airline to voluntarily permit Captains to downbid and serve past age 60 (J.A. 487-88; 492, No. 12).[3]

In view of these undisputed facts, the liability issue to be determined is whether the ADEA requires TWA to make the same accommodation for an age-related reason as it does for a non-age reason, or whether such a requirement is, as the dissent notes below, "like comparing apples with oranges" (A-35 to A-36). Plaintiffs do not, and cannot, dispute the fact that the few non-age accommodations in the Working Agreement were just as available to them. Nevertheless, they want the same accommodations simply because of their age. TWA's policy was in full compliance with the law because the ADEA does not mandate that type of preferential treatment. Moreover, TWA's effort to treat everyone equally was based on legitimate reasons other than age and was the result of a bona fide seniority system (TWA Op. Br., pp. 17-30).

B. The Plaintiffs Ignore the Importance of the Need for a Vacancy in TWA's Seniority System

The EEOC contends that the absence of a Flight Engineer vacancy "simply begs the question" at issue (EEOC Br., p. 19 n.26). However, this Court has recognized that "the absence of a vacancy in the job sought" can be fatal to establishing a prima facie case. *Teamsters* v. *United States,* 431 U.S. 324, 358 n.44 (1977). Even where there has been discrimination, an adversely affected employee "is not automatically entitled to have a non-minority employee laid off to make room for him.

3 Although they did not do so before the Second Circuit, the *Thurston* plaintiffs now seek to belittle (but do not dispute) TWA's performance in this regard (*Th.* Br., pp. 3-4). However, they cannot evade their own admission that as of March 23, 1982, "TWA [was] the only trunk airline which has, absent a court order, permitted Captains to downbid to Flight Engineer and serve in that status beyond age 60" (J.A. 487-88). Significantly, all the consent decrees to which they now cite in their brief (p. 3 n.2) are dated no earlier than December 27, 1982—over four years *after* TWA adopted its "age 60" policy in August 1978.

He may have to wait until a vacancy occurs," *Firefighters Local Union No. 1784* v. *Stotts,* ____ U.S. ____, 104 S. Ct. 2576, 2588 (1984).[4]

Here, the undisputed facts show that when there have been vacancies, downbidding Captains have exercised their seniority rights to obtain Flight Engineer positions. Indeed, none of the plaintiffs challenges the bona fides of TWA's seniority system. While the plaintiffs dismiss the applicability of TWA's pilot seniority system to this case (*Th.* Br., p. 21; EEOC Br., p. 22), the fact remains that plaintiffs could not become Flight Engineers under the Working Agreement without a vacancy.[5]

Nothing in law suggests that TWA should have so altered its seniority system for plaintiffs. As this Court recently reiterated in *Firefighters, supra,* 104 S. Ct. at 2583-84 n.4, "[s]eniority has traditionally been, and continues to be, a matter of great

4 Emphasis in quotations is added unless otherwise noted.

Counsel for the *Thurston* plaintiffs has himself recognized that a lack of a vacancy is a legitimate and common explanation for an individual's failure to obtain a job. See Br. for Resp. in Opp. to Pet. for Cert. in *Western Air Lines, Inc.* v. *Criswell,* No. 83-1545, pp. 7-8 (stating in another "age 60" case that pilot "Criswell's bid was denied, not because of a *lack of openings or any other usual business reason*").

5 Plaintiffs also suggest that this Court should not consider TWA's reliance on its seniority system since it was not specifically cited as one of the "questions presented" in TWA's petition for certiorari (*Th.* Br., p. 20; EEOC Br., p. 22 n.28). However, Rules 15.1(a) and 21.1(a) of this Court fully recognize that the "questions presented" for review "will be deemed to comprise every subsidiary question fairly included therein."

In this regard, the EEOC conceded in its memorandum in opposition to ALPA's cross-petition for certiorari in No. 83-1325 (p.2) that ALPA's "BFOQ" issue "merely states" just such a "subsidiary issue" to TWA's petition. If that is true for ALPA's "BFOQ" question, then it is equally true for TWA's reliance on its seniority system that was discussed by both courts below (A-25 to A-26, A-57) and noted in TWA's petition for certiorari (p.20 n.*). Accord, *e.g., Procunier* v. *Navarette,* 434 U.S. 555, 559-60 n.6 (1978); *Peters* v. *Kiff,* 407 U.S. 493, 495 (1972).

concern to American workers." Those workers, including TWA's pilot force, develop legitimate seniority expectations which are honored by adherence to the bona fide seniority provisions of the Working Agreement. If TWA "does not vigorously defend the implementation of its seniority system, it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity." *Firefighters, supra,* 104 S. Ct. at 2591 (O'Connor, J., concurring).

TWA's policy was an effort to accommodate the requirements of *both* the ADEA and the Railway Labor Act (TWA Op. Br., p. 21 n.24).[6] It is well-established that courts are "generally less competent than employers to restructure business practices," *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 578 (1978), and that is particularly true where the potential "disruption of the existing seniority system [could] violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations." *Ford Motor Co.* v. *EEOC,* 458 U.S. 219, 229 (1982).

---

6 In their briefs, plaintiffs continue to make light of TWA's clear statutory obligation under Section 6 of the Railway Labor Act ("RLA") to maintain the same "rates of pay, rules, or working conditions" (45 U.S.C. § 156). The *Thurston* plaintiffs ignore this issue completely, and the EEOC's attempted rebuttal (EEOC Br., p. 25 n.31) ignores the fact that the Working Agreement did not contemplate downbidding after age 60. Indeed, the EEOC concedes "there is no claim that any of the pilots here involved have transfer rights under the express contractual provisions of the Working Agreement." (EEOC Br., p.17 n.25).

To have adopted the type of "remedial" relief suggested by the EEOC would have subjected TWA to obvious labor grievances for violating the Working Agreement, and the forum to hear those grievances, the TWA system board of adjustment, is by law limited in its jurisdiction to the Working Agreement. See RLA, Section 204, 45 U.S.C. § 184; *De La Rosa Sanchez* v. *Eastern Airlines, Inc.,* 574 F.2d 29, 31-32 (1st Cir. 1978), and cases cited therein. As it was, TWA's "age 60" policy prompted not only ALPA's lawsuit (J.A. 108-15), but it also prompted a separate lawsuit alleging RLA violations by a group of furloughed Flight Engineers. See *Cafferty* v. *TWA,* 488 F. Supp. 1076 (W.D. Mo. 1980).

C. The Application of TWA's "Age 60" Policy Has Been Nondiscriminatory

In an effort to divert this Court's attention from TWA's "unrebutted" 83% success rate for downbidding Captains (A-61 n.8) and its 100% success rate for "career" Flight Engineers, the plaintiffs have sought to emphasize in their briefs the period of time when TWA was seeking to formulate its "age 60" policy (*Th.* Br., pp. 9-11; EEOC Br., pp. 4-6). During that period, there were obvious disagreements within the Company as to what the new law required, and these disparate views were strongly held by the various individuals involved.[7]

However, the *ultimate* Company policy permitted service by Captains beyond age 60 "in accordance with the seniority and bidding procedures of the Working Agreement" (A-9), and this was at a time when no other airline was allowing *any* Captains to downbid and serve beyond age 60 (J.A. 561-62). The Second Circuit recognized that "TWA *immediately* reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978." (A-9).[8] The Second

---

7 It should be noted that many of the record references now cited by the plaintiffs (particularly the *Thurston* plaintiffs) were previously so insignificant to any issue in this case that they were not even designated by anyone to be part of the Joint Appendix. Indeed, the Second Circuit viewed the period when the Company was formulating its policy to be so insignificant that it devoted only one sentence of its entire decision to this period, and that sentence only related to TWA's failure "to agree with ALPA on a revision of TWA's retirement program" (A-9). It is only now that this period has magically become so important to the plaintiffs.

8 Included in those reinstated was an International Relief Officer ("IRO") who was viewed as being in the Flight Engineer status for the purposes of TWA's "age 60" policy (J.A. 1023-24). This is criticized by the plaintiffs (*Th.* Br., p. 6; EEOC Br., p. 7 n.11), but IRO's enjoy a special contractual "prior right" (not based on age) to the Flight Engineer seat (J.A. 609, Art. 1; 351-52, ¶ 5.A) while none of the plaintiffs is covered by the 1962 Agreement providing for such "prior rights" (J.A. 616; 492, No. 11). Moreover, TWA is bound by an arbitrator's ruling that an IRO "assumes the position of, and performs the duties of, the Flight Engineer." (J.A. 607). See also J.A. 208-14.

Circuit also noted that "*[m]ost* of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60." (A-10). In addition, TWA has instituted a special program of guidance for Captains approaching age 60 whereby such Captains specifically meet with a Company representative to discuss the options available to them. A "Memo to File" is prepared after the meeting which states that the individual Captain is "thoroughly briefed as to the responsibilities associated with his transition to a Flight Engineer status." (J.A. 481-83). Those Captains who wish to serve beyond age 60 sign a letter expressing that intent (J.A. 484-86).

In view of this undisputed record,[9] it would be highly ironic to hold TWA liable for age discrimination when two other major carriers, American Airlines and Delta Air Lines, have successfully defended on safety grounds their "age 60" policies of allowing *no* downbidding Captains beyond age 60. See *Johnson* v. *American Airlines, Inc.*, 18 (CCH) Av. Cas. 17,177 (N.D. Tex. 1983), *appeal pending*, No. 83-1610 (5th Cir.); *Iervolino* v. *Delta Air Lines, Inc.*, No. C81-2327A (N.D. Ga. June 22, 1984).[10] Like American and Delta, TWA has "to

9 The *Thurston* plaintiffs (Br., pp. 19-20) seek to disparage TWA's performance by relying on *Connecticut* v. *Teal*, 457 U.S. 440 (1982). However, *Teal* fully recognized that where there is a question of intent, an employer's "nondiscriminatory 'bottom line' " (such as TWA's 83% success rate) can "assist an employer in rebutting the inference that particular action [*e.g.*, TWA's policy] had been intentionally discriminatory" (*id.* at 454).

10 See also *Monroe* v. *United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), where the Seventh Circuit recently reversed and remanded for a new trial on whether United's policy of allowing *no one* to serve beyond age 60 was permissible under the ADEA. Aside from TWA, there is now only one other carrier, Western Air Lines, which is subject to a finding of age discrimination for its "age 60" policy. See *Criswell* v. *Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3722 (U.S. March 16, 1984) (No. 83-1545). In contrast to TWA, Western's "age 60" policy prohibited anyone from serving in the cockpit beyond age 60.

perform [its] services with the highest possible degree of safety" under Section 601(b) of the Federal Aviation Act (49 U.S.C. § 1421(b)). The fact that TWA's Vice President of Flight Operations also felt strongly for safety reasons about former Captains in the cockpit beyond age 60 is perfectly understandable in the context of the uncertain status of the law and TWA's duty to comply with the Federal Aviation Act.[11]

II. THE STANDARD FOR WILLFULNESS ADVOCATED BY THE PLAINTIFFS WOULD NULLIFY THE CLEAR CONGRESSIONAL INTENT OF TWO-TIERED LIABILITY UNDER THE ADEA

Both the *Thurston* plaintiffs and the EEOC state that the proper standard for "willfulness" under the ADEA requires only "that the defendant knew or should have known its actions were *governed* by the ADEA." (*Th.* Br., p. 25; EEOC Br., p. 32). Under such a standard, any employer which was *aware* that the ADEA covered its employees would be automatically subject to double damages once there was a finding of liability. That would completely emasculate the ADEA's two-tiered standard of liability which Congress clearly established (TWA Op. Br., pp. 31-32).

Congress expressly chose language in Section 7(b) of the ADEA indicating that liquidated damages were to be the exception and not the rule: "*Provided*, That liquidated damages shall be payable *only* in cases of *willful* violations of this Act." (29 U.S.C. § 626(b)). Accord, *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). By ignoring the word "only," the plaintiffs have thereby forgotten the cardinal principle that a statute " 'ought . . . to be so construed that . . . no clause, sentence, *or word* shall be superfluous, void, or insignificant.' " *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971).

11 See J.A. 1002; R. 165, pp. 47-48 (J.A. 19). The Company's ultimate policy (J.A. 425) was adopted with the concurrence of both Flight Operations (Mr. Frankum) and Labor Relations (Mr. Crombie), and the actual text of the policy was written by Mr. Hilly of Labor Relations (J.A. 1031-32).

The recent Second Circuit opinion in *Haskell* v. *Kaman Corp.*, ____ F.2d ____, 35 FEP Cases 941 (2d Cir. 1984), shows the folly of the slight willfulness standard urged by the *Thurston* plaintiffs and the EEOC. Writing for the panel in *Haskell*, Judge Mansfield (the author of the majority opinion here) reaffirmed the holding in *ALPA* that "a plaintiff 'need not prove a specific intent to violate the ADEA' " for willfulness purposes (*id.* at 947). Instead, he said:

> "[A]lthough there is a split of authority on the extent of knowledge on the part of the employer required to establish willfulness, we believe that a plaintiff must at least *show that the employer was aware that its conduct was governed by the ADEA* . . ." (*id.* at 947-48).

Obviously, such a minimal standard almost mandates double damages, for virtually any employer is going to be "aware that its conduct was governed by the ADEA."[12]

The *Haskell* opinion is also of significance since it demonstrates the equally slight showing required to find willfulness under the test of an employer acting in "reckless disregard":

> "[T]he *failure* of such an employer *to investigate the matter* [*i.e.*, whether the conduct was governed by the ADEA] . . . *would amount to reckless disregard* for whether its conduct violated the Act." (*Id.* at 948).

12 The EEOC itself recognizes that "only in the rarest cases will employers be deemed to be reasonably unaware of the ADEA. As the court below noted (Pet. App. A34), the Act itself requires employers to post notices of its applicability. 29 U.S.C. § 627." (EEOC Br., p. 39 n.45).

In this regard, the Tenth Circuit has recently adopted the "aware that conduct is governed by the ADEA" test for willfulness. *EEOC* v. *Prudential Fed. Sav. and Loan Ass'n*, ____ F.2d ____, 35 FEP Cases 783 (10th Cir. 1984). Its factual finding further shows how such a test dilutes the meaning of "willful":

> "The record contains testimony by Prudential executives and members of the board demonstrating that *the company in fact knew its employees were protected by the ADEA* . . . [W]e conclude as a matter of law that Prudential's conduct . . . constituted a willful violation within the meaning of the ADEA." (*Id.* at 790).

In view of such language, the "reckless disregard" test urged by the *Thurston* plaintiffs (*Th.* Br., p. 25) hardly begins to probe the ultimate question of discriminatory animus on the part of the employer. If all that is required for "reckless disregard" is a showing that an employer did not "investigate" whether its conduct "was governed by the ADEA," "reckless disregard" is almost automatic.

Accordingly, neither the "aware of conduct governed by the ADEA" nor a "reckless disregard" test begins to answer the question whether an employer has acted "willfully." The most logical test, and the one that best effectuates the plain language of the statute and Congressional intent, is the one requiring proof of specific intent to discriminate in violation of the ADEA (TWA Op. Br., pp. 30-37).[13]

III. THE PROCEDURAL ARGUMENTS RAISED BY ALPA ARE WITHOUT MERIT AND SHOULD NOT DETER A HOLDING THAT A UNION CAN BE MONETARILY LIABLE UNDER THE ADEA

In its brief as respondent, ALPA has raised a series of procedural arguments which, it claims, precludes this Court's consideration of a union's monetary liability under the ADEA. These arguments are meritless and should not deter this Court from holding that a union can be liable for monetary relief.

ALPA initially charges that TWA lacks "standing" to raise the question of a union's monetary liability since TWA is not one of the plaintiffs (ALPA Resp. Br., pp. 7-8).[14] In order to have standing, this Court requires that a petitioner have a " 'personal stake in the outcome of the controversy' " consist-

13 See also *amicus* briefs of U.S. Chamber of Commerce, pp. 6-10; and the Equal Employment Advisory Council, pp. 8-22.

14 It is significant to note that when ALPA opposed TWA's petition for certiorari on the question of a union's monetary liability under the ADEA, it never questioned TWA's standing. In any event, the issue is properly before this Court because the plaintiffs surely have standing on this issue and have raised it. That is all that is necessary. See, *e.g.*, *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 302-05 (1983).

ing of a " 'distinct and palpable injury,' " *Larson* v. *Valente*, 456 U.S. 228, 238-39 (1982). Clearly, TWA has satisfied that threshold. Unless the decision below is reversed, TWA is stuck with total monetary liability under the ADEA even though both employer and union defendants were found liable. If that inequity and resulting financial cost to TWA is not a "distinct and palpable injury," then nothing is.[15]

ALPA also argues that TWA is barred from raising the question of union liability because TWA had never raised this issue prior to its petition for certiorari (ALPA Resp. Br., pp. 9-10). Of course, TWA had not previously raised the question because it was not an issue until *after* the Second Circuit had denied petitions for rehearing (A-40 to A-43) and released its "Errata Sheet" (A-37 to A-39) from which there was no appeal except to this Court.

Previously, the district court had granted TWA's motion for summary judgment, and therefore the question of union liability was never reached. At the appellate level, the Second

15 ALPA also raises the bizarre argument that the Second Circuit's finding of union liability was intended to apply only to the plaintiffs represented by the EEOC and not to the private plaintiffs (ALPA Resp. Br., p. 4). The basis for ALPA's argument is that the Second Circuit's decision used at one point the words "EEOC plaintiffs," and ALPA contends this means that the Second Circuit therefore did not intend to include the private plaintiffs when it imposed liability. Of course, ALPA gives no credible explanation why the Second Circuit would make such a distinction when it spends three pages of its decision detailing what it perceives as *ALPA's* culpability here (A-31 to A-33). See also *Thurston* brief, p. 41 n.46. Clearly, ALPA's disingenuous footnote on this subject is inadequate as an explanation (ALPA Resp. Br., p. 4 n.2).

Equally bizarre is ALPA's argument that since the EEOC did not file a cross-petition for certiorari, the issue cannot now be raised because the EEOC "may not . . . seek to enlarge its rights on appeal." (ALPA Resp. Br., p. 8). Obviously, none of the plaintiffs had to file a cross-petition since their rights were not being enlarged beyond what TWA had raised as the issue in its initial petition. Accordingly, the cases which ALPA cites in support of its argument (ALPA Resp. Br., p. 8 n.5) are inapposite.

Circuit initially agreed that there should be joint monetary liability (A-34 to A-35). It was only after the Second Circuit completely reversed itself through the vehicle of its "Errata Sheet" (A-37 to A-39) that TWA had any reason to raise the issue.[16]

Finally, ALPA contends that TWA cannot raise the issue of union liability because that would be an attempt at seeking contribution which, ALPA says, is barred by this Court's decision in *Northwest Airlines, Inc.* v. *TWU*, 451 U.S. 77 (1981) (ALPA Resp. Br., pp. 10-16). However, the question of contribution is irrelevant to whether a *co-defendant* union can be held liable for monetary relief under the ADEA. See, *e.g.*, *id.* at 88-89 n.20 and the discussion in the *amicus* brief (p. 23 n.16) by the Equal Employment Advisory Council ("EEAC"). Indeed, even ALPA concedes in its respondent brief (p. 11) that "*Northwest Airlines* was a separate lawsuit for contribution" rather than a case involving co-defendants.

In the event of liability, this Court should therefore face the important substantive question which all the parties but ALPA have raised about union liability under the ADEA.[17] In that regard, it should carefully consider the fact that ALPA and the *amicus* AFL-CIO are unable to cite to one instance in the ADEA's legislative history which would suggest that Congress intended to exclude unions from monetary liability under the ADEA. Accord, *EEOC* v. *ALPA*, 489 F. Supp. 1003, 1009 n.5

16 The cases cited by ALPA in its brief (pp. 9-10) are therefore inapposite since they pertain to situations where an appellate court had not "considered" the question at all. Here, the Second Circuit actually examined the issue not just once but *twice*. That is certainly having the question "considered by the Court of Appeals," *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

17 See TWA Opening Brief, pp. 38-44; *Thurston* brief, pp. 33-43; EEOC brief, pp. 41-48. See also *amicus* brief of U.S. Chamber of Commerce, pp. 10-14; *amicus* brief of EEAC, pp. 22-26. As the *Thurston* and EEOC briefs readily show, it is not the case that "[p]laintiffs here have abandoned their claim for damages against ALPA" (ALPA Resp. Br., p. 13 n.14).

(D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

The purposes of the ADEA would obviously be emasculated by a wooden adherence to the remedies of the Fair Labor Standards Act ("FLSA") when the purposes of that statute differ markedly from the ADEA (TWA Op. Br., pp. 40-41).[18] It must be remembered that Section 7(b) of the ADEA expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this* Act," not the FLSA. Such statutory language, the policy reasons, the ADEA's legislative history, the provisions in other labor statutes and sound logic compel only one result: a union should be liable for monetary damages under the ADEA to the extent of its culpability.

Respectfully submitted,

HENRY J. OECHLER, JR.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 541-5800
Counsel of Record for
Trans World Airlines, Inc.

DONALD I STRAUBER
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE
& WOLFF
Of Counsel

September 24, 1984

---

18 See also *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 373-74 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Bd.*, 462 F.2d 180 (4th Cir. 1972), where a co-defendant union was held liable for monetary damages under the Equal Pay Act, 29 U.S.C. § 206(d), which is part of the FLSA.